IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 208 of 2004

with

CRIMINAL MISC.APPLICATION No 5388 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHIVABHAI @ VAJESING MATHUR BHAI PARMAR
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 208 of 2004
MR NITIN M AMIN for Appellant No.
MS HARSHA DEVANI, APP for Respondent No. 1

2. Criminal Misc.Application No. 5388 of 2004
MR NITIN M AMIN for Appellant No.
MS HARSHA DEVANI, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 04/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. This appeal is filed to challenge the judgment and order of conviction and sentence passed by the Ld. Addl. Sessions Judge and 6th Fast Track Court, Kheda at Nadiad in Sessions Case No. 274 of 1998 dated 2nd January, 2004. By the said judgment the appellants, original accused nos. 1 to 4 have been convicted for the offence under Section 302 read with section 114 of the Indian Penal Code [for short 'IPC'] and have been sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/= each, in default further RI for six months and they have also been convicted for the offence under section 325 read with section 114 of the IPC and they have been sentenced to suffer RI for five years and to pay a fine of Rs.500/= each, in deafult further RI of three months. Further they have been convicted for the offence under section 323 read with section 114 of the IPC and they have been sentenced to suffer RI for three months and to pay fine of Rs.200/= each, in default further RI for 15 days. The learned trial Judge has, however, acquitted the present appellants and original accused no. 5 of the offences under sections 147, 148 read with section 149 of the IPC. The original accused no. 5 - Divaliben Shivabhai alias Vajesing Mathurbhai Parmar has also been acquitted of all the charges levelled against her.

2. The case of the prosecution in brief can be stated as under :-

2.1. One Savitaben, widow of Vakhatsinh Malsinh Rathod lodged First Information Report with Thasra Police Station on 24th November, 1997. It was alleged therein that on 23rd November, 1997 at about 8.0 p.m. all the four appellants armed with sticks came to their house and they started abusing. It was said that Sumitraben, daughter of appellant no. 1 - Shivabhai had committed suicide about 10 months prior to that day because of her illicit relations with the son of informant, namely Ganpat and, therefore, they (the appellants and accused no. 5) would not spare the

informant and her family members. So saying they mounted the assault on the informant, her husband and her son Narvatsinh. They, therefore, ran towards the market yard. They were chased by the appellants. It was further alleged that within short distance the appellants caught up with the informant and her husband and started beating them. The husband became unconscious and fell down on the ground. The informant was given blow on her back by accused no. 3. Her son Narvatsinh had run away from the place. After the beating was over, the appellants and accused no. 5 left. The informant went near her husband and found that he was already dead. She, therefore, went to the police station and lodged the first information against the appellants and original accused no. 5. On receipt of the information, the police registered offence against the accused under section 320 of the IPC and commenced the investigation. On completion of the due investigation, the charge-sheet was submitted in the Court of the concerned Magistrate, who committed the case to the Court of Sessions since the offence under section 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial, the learned trial Judge framed the charge at Exh. 4 on 13th June, 2003. The appellants and accused no. 5 pleaded not guilty and claimed to be tried.

3.1. At the trial, the prosecution, to substantiate its case, led evidence oral as well as documentary. The prosecution examined 13 witnesses and produced documentary evidence in the form of FIR, post mortem notes, various panchnamas, etc. At the end of recording of the evidence the further statements of the appellants and accused no. 5 were recorded under section 313 of the Code of Criminal Procedure. From these statements it appears that no specific defence was pleaded but a defence of general denial was taken. At the end of the trial, the learned Judge by aforesaid judgment convicted the appellants and sentenced them to suffer imprisonment stated above. It is this order of conviction and sentence, which is now sought to be challenged in this appeal.

4. Mr. N.M. Amin, learned advocate appearing for the appellants has submitted that the order of conviction and sentence passed by the learned trial Judge are erroneous and not in accordance with the evidence on record of the case. He has submitted that the prosecution has not been able to prove its case against the appellants beyond any reasonable doubt.

According to him, the evidence and in particular medical evidence shows that the death of the deceased has been caused on account of cardiac arrest due to excessive drinking of alcohol. He has, therefore, submitted that there is no intention to kill and the appellants at the most can be held liable of committing offence under section 325 of the IPC. He has, therefore, submitted that this appeal be allowed and the order of conviction and sentence for life imprisonment be quashed and set aside.

4.1. As against that, Ms. Harsha Devani, Ld. APP has supported the judgment of the trial Court. She has submitted that considering the evidence on record of the case, it clearly appears that the appellants had caused the death of the deceased since they wanted to take revenge of the suicide committed by the daughter of appellant no. 1. She has further submitted that even the medical evidence clearly showed that the injuries caused to the deceased were sufficient in ordinary course of nature to cause death and, therefore, the case of the appellants squarely fell under clause thirdly of section 300 of the IPC constituting an offence under section 302 of the IPC. Lastly she has submitted that this appeal has no merit and it deserves to be dismissed.

5. Mr. Amin has taken us through the oral evidence of the prosecution witnesses. P.W. No. 1 Savitaben Vakhatsinh Exh. 19 is the widow of the deceased Vakhatsinh. She is the informant in this case. In the examination-in-chief she has by and large reiterated the story which was narrated in the FIR. According to her, on the date of the incident the appellants and accused no. 5 came to their house armed with sticks. When they entered the house, the witness and her husband and her son Narvatsinh escaped from the back door and went towards the market yard. They were followed by the appellants. After running short distance the appellants could catch hold of the deceased and they started beating him. According to her, she was also at that time assaulted by appellants nos. 1 and 3. This witness has stated that after the appellants cleared the place, she went to her husband and found him dead. She, therefore, went to the police and lodged her complaint. She has duly identified the appellants in the Court room as the persons who had assaulted them. In the cross-examination by defence, she has denied the suggestion that the appellants had long standing enmity on account of dispute with regard to agricultural land. She has, however, stated that the appellants used to quarrel with them off and on. Though she has admitted

that daughter of appellant no. 1 - Sumitraben had committed suicide, she has denied that Sumitraben had any illicit relations with her son. According to her, the appellants falsely levelled this allegation against her son. It is also tried to be suggested to her that on account of winter there was darkness and she could not have identified the assailants. The defence has also put a suggestion to her that her deceased husband used to consume liquor in large quantity every day. She has, however, denied this suggestion. She has also denied that her husband had any heart ailment. She has further admitted that the police station is at the distance of about 100 paces from the market yard. According to her, she had lodged the FIR at about 8.00 to 9.00 p.m. She has further denied that the death of her husband was not due to cardiac arrest. She has also denied that it was not true that the appellants had beaten her husband.

5.1. P.W. 7 - Narvatsinh Vakhatsinh Rathod Exh. 41 is the son of the deceased and the informant. He has also given evidence on the incident on the basis of he being an eye witness of it. He has deposed on the line of the informant Savitaben. He has adequately supported the version given by the informant that the appellants had arrived at their residence and they had thereafter chased them towards the market yard and they ultimately gave severe beating to his father Vakhatsinh, who died of the injuries received by him. He has in the cross-examination by the defence denied the suggestion that he was not present at all and he was away at the distance of 40 Kms. from the place of incident. He has also denied the suggestion that on the day of incident his father had consumed liquor in large quantity. Though he has been cross-examined extensively, it appears that the defence has not been able to elicit from him any material which could help the defence.

5.2. The prosecution has also examined various Panchas, the doctor and the police witnesses.

5.3. At this stage, it would be necessary to refer to medical evidence, which is in the form of oral evidence of Dr. Thakarsibhai Karsanbhai Vaghela as well as the documentary evidence in the form of post mortem notes at Exh. 37. This witness is examined as P.W. No. 6 at Exh. 32. He has deposed that the deceased had suffered about seven injuries, which were noticed by him upon performing the post mortem examination of the deceased. He has further stated that the injuries were caused by sticks. He has amply described these injuries in para. 3 of his evidence and in column no. 17 of the

post mortem notes, which are as under :-

(1) Red coloured transverse bruise (contusion) stick mark over Lt. chest which was extending from Rt. end of epigastrium to the 2" below Lt. nipple, size 6.5" x 1".
(2) Red coloured stick mark, Bruise over Rt. Lumbar (renal area) transverse, size 4" x 1".
(3) Parallel to bruise no. 2 2nd bruise - size 3" x 1".
(4) Swelling of dorsum of Rt. hand dorsally 3"x2".
(5) Abrasion over Rt. knee jt. dorsally 1"x2".
(6) Abrasion over middle of front of Rt. leg [1/2" x 1/2"]
(7) Abrasion over Lt. elbow - 1/2" x 1/2".

Over and above this he has also recorded in post mortem notes the condition of internal organs of the body. He has produced the post mortem notes of the deceased on record. Having carefully gone through his evidence, it appears that in the opinion of the doctor, the death was caused due to excessive drinking of alcohol on that day. At the same time he has opined in the evidence that the injuries were sufficient in ordinary course of nature to cause death. In the post mortem notes the cause of death described by him is as under :-

"The probable cause of death of deceased is syncope (cardiac arrest) due to shock. However, the definite cause will be given after report from FSL, Ahmedabad."

It also appears from the evidence that some portions of the internal organs were sent to the FSL for examination. The report of the FSL showed presence of alcohol. Thus, the evidence of this witness gives two versions, namely that the death is caused on account of excessive drinking of liquor on that day by the deceased, which resulted into his cardiac arrest and secondly that the injuries suffered by the deceased were sufficient in ordinary course of nature to cause death. Therefore, it appears that he is not very sure as to correct reason or cause of the death. Since both versions are there on record, one which favours accused i.e. the appellants will have to be accepted. This factor will have to be kept in mind while deciding the question as to which offence the appellants have committed.

6. We have also perused the other evidence on record. By and large the same supports the case of the prosecution and, therefore, the same is not required to be discussed in detail. Suffice it to say that this evidence does indicate that it was the appellants who had caused aforesaid injuries to the deceased on the date of incident.

7. In view of the aforesaid discussions, the question now to be considered is what offence has been committed by the appellants. As stated above, when two versions are possible, the version in favour of the appellants will have to be accepted. In that view of the matter, the appellants cannot be saddled with the liability of committing offence made punishable under section 302 of the IPC. Even otherwise if the evidence of the prosecution witnesses as well as that of the Medical Officer is perused closely, it would show that the appellants were armed with simple sticks. These sticks were not iron shod sticks. Further the appellants had caused the injuries to the deceased on different parts of his body near the chest and below it. Had the appellants entertained any intention to cause death of Vakhatsinh, they would have certainly aimed the blows on the vital part of the body, namely head. It is a common experience that when the stick is being used as weapon, usually fatal injury is caused on the head. In the instant case no injury is found on that part of the body. It, therefore, clearly appears that the intention of the appellants was only to belabour the deceased and the informant and nothing more. Further the evidence clearly shows that the appellants were not armed with dangerous weapons but were armed with simple sticks. Considering these factors, at the most the appellants can be said to have committed offence under section 325 of the IPC. Thus, the conviction recorded under section 302 of the IPC by the learned trial Judge is not proper and it is required to be quashed and set aside.

8. In view of the aforesaid, we alter the conviction of the appellants from one under section 302 of the IPC to under section 325 of the IPC. The sentence of imprisonment for life is quashed and set aside. Instead it is now substituted with imprisonment for a term of one year. The appellants are now directed to undergo sentence of imprisonment for one year. Sentence already undergone be given set off. However, looking to the facts and circumstances of the case, we are of the opinion that sentence of fine is required to be altered. The appellants are, therefore, sentenced to pay a fine of

Rs.6,000/= [Rupees Six thousand only] each, over and above the fine imposed by the learned trial Judge, in default further RI for one year. It is further directed that the amount of fine, if paid, be paid to the widow of the deceased, namely Savitaben Vakhatsinh by the Sessions Court after making due verification regarding her identity.

With aforesaid direction, this appeal is partly allowed.

Muddamal articles to be disposed of in accordance with the direction given by the learned trial Judge in the judgment.

In view of the above, no order is required to be passed on the application for regular bail being Criminal Misc. Application No. 5388 of 2004 and it is disposed of accordingly.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.